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CHARLES ELMORE

Supreme Court of the United States

October Term, 1933.

No. [redacted]1.

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting The State Tax Commission of The State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR PETITIONERS, SUPPLEMENTAL TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

October Term, 1933.

No. 831.

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting The State Tax Commission of The State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR PETITIONERS, SUPPLEMENTAL TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

This cause comes to this Honorable Court upon the entry of an order on the 2nd day of April, 1934, by this Court, granting a petition for a writ of certiorari directed to the Supreme Court of the State of New York. Petitioners respectfully file this brief as a supplement to the brief in support of the petition for writ of certiorari.

ARGUMENT.

A State income tax laid upon the rents of real property located in another State is not a tax upon the property, and such a tax is not violative of the Constitution of the United States.

The decisions of the State courts here under review and the contention of the taxpayer herein rest entirely upon the principle that real property and tangible personal property may only be taxed by the State of domicile, and upon the mistaken belief, as we contend, that this Honorable Court, in the case of *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, on rehearing 158 U. S. 601, held that a tax upon the income of real property was a tax on the real property itself. We think that the State courts have misconceived the scope and effect of the decision in the *Pollock* case.

So far as applicable to an income tax on the rents of real property, the decision in the *Pollock* case was limited to a holding that a tax on the rents or income of real estate is a direct tax within the meaning of the United States Constitution. On the rehearing of the case, Mr. Chief Justice Fuller said, at page 618:

> "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; *and the Court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct;* while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and

no reference was made to the nature of the tax as being direct or indirect." (Emphasis ours.)

In *Knowlton v. Moore*, 178 U. S. 41, at page 82, this Honorable Court said, of the decision in the *Pollock* case:

> "The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was *the legal equivalent of a direct tax on the property from which said income was derived*, and hence must be apportioned." (Emphasis ours.)

In *Flint v. Stone Tracy*, 220 U. S. 108, this Court said, page 162:

> "In the *Pollock* case, as we have seen, the tax was held unconstitutional, because it was *in effect* a direct tax on the property solely because of its ownership." (Emphasis ours.)

In *McCoach v. Minehill Railway Co.*, 228 U. S. 295, at page 301, this Court, analyzing its decision in the *Flint v. Stone Tracy* case, said:

> "In discussing the constitutional question, reference was first made to the case of *Pollock v. Farmers Loan & Trust Co.* * * * which held the income tax provisions of the Act of August 27, 1894 * * * to be unconstitutional because *amounting to* a di-

> rect tax within the meaning of the Constitution, and because not apportioned according to population as required by that instrument." (Emphasis ours.)

In *Stratton's Independence v. Howbert*, 231 U. S. 399, at page 414:

> "This court had decided in the *Pollock Case* that the income tax law of 1894 *amounted in effect to a direct tax* upon property, and was invalid because not apportioned according to population as prescribed by the Constitution." (Emphasis ours.)

It is clear, we think, that the *Pollock Case* is a determination that an unapportioned Federal income tax upon the income of real property is violative of the Constitution, but in no wise holds that a tax on such income *is* a tax on the property.

The Appellate Division, in its opinion in the instant case, quoted from the *Pollock Case* as follows:

> "An income tax upon the annual value or annual user of real estate appears to be the same in substance as an annual tax upon the real estate which would be paid out of the rent or income. *(Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 581.)"

This is illustrative of the danger of culling a general statement from an opinion and quoting it apart from the context of the opinion. Immediately preceding the sentence quoted by the Court below are the following two sentences:

> "The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its

> ownership belongs to the other? We are unable to perceive any ground for the alleged distinction."

Very plainly the Court was considering the nature of a tax upon the income of real estate and of a tax upon the real estate itself solely from the standpoint of direct or indirect taxation. The power of Congress to impose an income tax on the rents of real estate as a general proposition, was not at all in question—there was only the question of the constitutionality of an unapportioned Federal tax on income from real estate.

The imposition of a Federal income tax upon a citizen of the United States, upon income derived from real estate situated in Mexico, has been upheld *(Cook v. Tait,* 265 U. S. 47).

If the *ratio decidendi* of the *Pollock* case was, as held by the State courts, that a tax on the income from real estate was a tax on the real estate itself, then Congress manifestly could not have subjected the income from Mexican real estate to an income tax.

If the imposition of a Federal income tax upon income derived from Mexican real estate was not a taking of property without due process of law, in derogation of the Fifth Amendment, then we believe that it necessarily follows that the imposition of a State income tax upon one of its residents, with respect to income from property located in another State, is not a taking of property without due process of law, in violation of the Fourteenth Amendment.

In *Cook v. Tait, supra,* the Court said, page 56:

> "In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the *situs* of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of a citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have *situs,* in a foreign country and the tax be legal—the government having power to impose the tax."

Without question, the State of New York has power to impose an income tax upon one of its residents. Domicile in itself establishes a basis for taxation *(Lawrence v. State Tax Commission,* 286 U. S. 276). Enjoyment of the privileges of residence and citizenship in a State amply justifies the requirement that its residents and citizens respond to the cost of its government.

All subjects over which the sovereign power of the State extends are objects of taxation *(McCulloch v. Maryland,* 4 Wheat. 428).

The power of a State as to the form and mode of taxation is unlimited unless restrained by the Constitution of the United States, where the subject is within the jurisdiction of the State (State Tax on Foreign Held Bonds, 15 Wall. 300).

A debt may be taxed by a State to a resident thereof, though held against a non-resident, evidenced by the bond of such non-resident and secured by a mortgage upon real estate situate in another State; and this, though the bond be held or deposited without the State (*Kirtland v. Hotchkiss,* 100 U. S. 491). In that case this Honorable Court said, at page 498:

> "The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same State, to contribute for the support of the government whose protection he enjoys."

In *Fidelity & C. Trust Co. v. Louisville,* 245 U. S. 54, a case involving the imposition of a personal property tax on a bank deposit located in another State, this Court said (page 58):

> "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed."

Opposing counsel concedes that the State of New York has power, in the physical sense, to tax its residents on rentals from real estate located elsewhere, but contends that it lacks the legal power to lay such a tax because the United States Constitution imposes a restraint on the exercise of such physical powers. But the claimed constitutional restraint arises from the mistaken postulate that a tax on the income from

real estate is a tax on the real estate itself. That such a tax, to some extent, burdens the real estate may be conceded and that such a tax accomplishes a similar effect as an unapportioned tax on the real estate may also be admitted without in any wise affecting the question now before this Honorable Court. Conceding all these matters, we still think that it is most manifest that the constitutional restriction against the taxation by a State of real property or tangible personal property located beyond the borders of the taxing State, has no application to the taxation by a State of one of its residents, with respect to the income from real property located in another jurisdiction; and this, especially, where the taxation reaches such income, as part of a general integrated system of taxation, and the particular item of income has lost its identity and become intermingled with and part of the resident's entire net income from all sources.

There is no merit in respondent's contention that the record does not show that a Federal question was expressly or necessarily decided by the State Court.

Respondent opposed petitioners' application for a writ of certiorari in this Honorable Court, upon the ground that it did not affirmatively appear that the Appellate Division of the New York Supreme Court ever passed upon the federal questions upon which application for the writ was based, or that the decision of these federal questions was necessary to the decision of the case. Respondent then set forth an incomplete quotation from Brief of Respondent in the New York Court of Appeals and argued that an independ-

ent ground, *i. e.*, statutory construction, existed and was urged in the Court of Appeals.

Respondent, in quoting from her brief in the Court of Appeals, omitted the opening words of the first sentence, which were, "In conclusion under this point let it be noted that" we do not dispute, etc., etc.

And the point under which this phase of Respondent's argument was made was captioned:

> "Under the Federal Constitution a State of the Union may not exact a tax which constitutes, in substance and effect, a tax on tangible property situated in another state. Such an exaction would violate the due process clause of the Fourteenth Amendment."

Stating in her brief in the Court of Appeals, the question presented to that Court, respondent said:

> "This appeal presents a single question—whether under the Constitution of the United States a State can impose an income tax with respect to income derived from rentals from real property situated in another State."

In opposition to petitioners' application for writ of certiorari, respondent also contended that the opinion of the Appellate Division (R. 19) indicated that the decision was on a non-Federal ground. The contention is refuted by the opinion itself, which clearly was based on a Federal ground and by the further fact that the Appellate Division, by the same opinion and decision sustained, under the same statutory provision, the imposition of the New York income tax upon income from the same Ohio real estate, derived in the form of profit

from a sale thereof, upon the theory that such a tax was an excise and not a property tax, as it unquestionably found the tax on rental income to be.

CONCLUSION.

The order and judgment of the Supreme Court of the State of New York should be reversed and the determination of the State Tax Commission confirmed, with costs.

Respectfully submitted,

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Appendix A.

NEW YORK TAX LAW, §351.

"§351. Imposition of income tax. A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars, but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, and for any taxable year ending during the year nineteen hundred and nineteen."